Supreme Court, U.S.
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No. 90-626

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION, FREDRICKS DEVELOPMENT CORPORATION, and DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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I. INTRODUCTION.

This supplemental brief is being filed to address the proper disposition of the due process challenge raised by petitioners in light of this Court's recent decision in *Pacific Mutual Life Ins. Co. v. Haslip*, _____ U.S. _____ (1991). Under the *Haslip* decision, the petition for *certiorari* must be denied.

II. ARGUMENT.

A. The California Scheme Meets The Requirements Of Due Process As Set Forth In *Haslip*.

The California scheme under attack here provides numerous protections to defendants in punitive damage cases, far more than are required under *Pacific Mutual Life Ins. Co. v. Haslip*, _____ U.S. _____ (1991). Those protections can be summarized as follows:

(1) At trial, the jury is instructed[1] that it

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[1] The jury was instructed:

If you find that MGW suffered damage as a proximate result of any of the defendants' conduct on which you base a finding of liability, you may then consider whether you should award punitive damages against that defendant, or those defendants, for the sake of example and by way of punishment. You may in your discretion award such damages if, but only if, you find by *clear and convincing evidence* that said defendant was guilty of *fraud or malice* in the conduct on which you base your finding of liability.

Malice means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a

may assess punitive damages only where it finds the defendant guilty of certain offenses.

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willful and conscious disregard of the rights of others.

A person acts with conscious disregard of the rights of others when it is aware of the probable economic consequences of its conduct and willfully and deliberately fails to avoid those consequences.

"Despicable conduct" is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon by ordinary decent people.

Fraud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal right or otherwise causing injury.

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following: *1. The reprehensibility of the conduct of the defendant; 2. The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; 3. That the punitive damages must bear a reasonable relation to the actual damages.*

If you find that MGW is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict. CT 876-7. [Emphasis added.]

(2) The jury must also find a mental element, "malice, fraud, or oppression", which are defined to the jury and which involve conscious wrongdoing.

(3) The jury may only assess punitive damages upon proof by *clear and convincing evidence.*

(5) The jury is instructed that the amount of punitive damages must bear a reasonable relationship to actual harm.

(6) The jury is instructed that the damages should be of an amount sufficient to deter and punish.

(7) After the verdict, the jury award is reviewed by the judge, sitting as a thirteenth juror, who must reduce the award if, in his "independent judgment", it is excessive.[2]

(8) On appeal, the award again is reviewed for excessiveness. *See, e.g., People v. Grocers Wholesale Co.*, 214 Cal. App. 3d 498, 514, 262 Cal. Rptr. 689, 699 (1989); *Dumas v. Stockter*, 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311, 314 (1989); *Wollersheim v. Church of Scientology*, 212 Cal. App. 3d 872, 906, 260 Cal. Rptr. 331, 353 (1989), *cert. denied* 110 S. Ct. 1937; *Kaye v.*

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[2] "[T]he trial court, in ruling on the [new trial] motion, sits not in an appellate capacity but as an independent trier of fact." *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 933, 148 Cal. Rptr. 389, 402, 582 P.2d 980 (1978). California Code of Civil Procedure section 662.5 provides for the trial court to issue a remittitur "of so much [of the verdict] as the court in its *independent judgment* determines from the evidence to be fair and reasonable".

In *Neal*, the trial court's reduction of a punitive damage award was upheld.

Mount La Jolla Homeowners Ass'n., 204 Cal. App. 3d 1476, 1492-93, 252 Cal. Rptr. 67, 77 (1988).

These protections satisfy the requirements of due process under *Haslip*. There, the jury instruction on punitive damages offered much less guidance than the instruction in this case.[3] Here, by contrast, the instruction not only informed the jury of the purpose of punitive damages (in terms similar to those approved in *Haslip*), but provided additional guidance as to the mental culpability of the defendant, requires clear and convincing evidence, and that the award must bear a reasonable relationship to actual harm.

After the award, under California law, the defendant has the right to seek review by the trial judge of the amount of the award. The trial judge's review is *not* a rubber-stamp review according a high level of deference to the jury's verdict. Rather, the judge must reduce the award if, in his "independent judgment", it is excessive.

Nor does the amount of the punitive damage award in this case raise due process concerns. The actual damages awarded in this case are $773,200.00. The punitive damages assessed against Pacific Lighting and Dunn Properties, $800,000 each, are only slightly higher than the actual damages. The award against Fredricks Development, $400,000, was much less that the actual damages. The total punitive damage award

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[3] That instruction stated, in relevant part: "Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so."

was less than three times the actual damages. In *Haslip*, the punitive damage award was "more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses...".

It bears noting that not only does this case fall squarely within the due process requirements enunciated by the majority in *Haslip*, it also meets the standards of Justice O'Connor, the lone dissenter. Justice O'Connor noted with approval the "Green Oil factors"[4] used by Alabama courts to review a jury

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[4] Those factors are:

"(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be

award of punitive damages, and indicated that a jury instruction patterned after those factors would satisfy due process. ["The Alabama Supreme Court has already given its approval to the Green Oil factors. By giving these factors to juries, the State would be providing them with some specific standards to guide their discretion....Other procedural safeguards might prove equally effective." *Pacific Mutual Life Ins. Co. v. Haslip*,_____ U.S. _____ (1991) (O'Connor, J., dissenting).

Justice O'Connor also noted that other procedural safeguards, for example requiring proof by clear and convincing evidence, are available. Finally, she concluded:

> Given the existence of several equally acceptable methods, concerns of federalism and judicial restraint counsel that this Court should not legislate to the States which particular method to adopt. I would thus leave it to individual States to decide what method is most consistent with their objectives....
>
> [W]e need not dictate to the states the precise manner in which they must

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included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award." *Pacific Mutual Life Ins. Co. v. Haslip*,_____ U.S. _____ (1991) (O'Connor, J., dissenting).

address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.

The California jury instruction combined with the requirement of proof by clear and convincing evidence satisfies even Justice O'Connor's due process requirements.

B. No Reason Exists To Vacate And Remand In This Case.

Remand of a case for further consideration in light of new United States Supreme Court decision is warranted only where there is reason to believe that the result reached by the lower court "might have been different" if the new precedent had been available to it. *See Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25-6 (1978) (Stevens, J., dissenting) There is no basis to believe that to be the case here.

The California Court of Appeals in this case addressed and rejected the challenge to due process.[5]

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[5] The Court of Appeal opinion stated:

> Finally, it argues the award of punitive damages is supported by insufficient evidence, and punitive damages are unconstitutional. However, there is sufficient evidence in the record to support the award, and punitive damages are constitutional under the Eighth Amendment (*Browning-Ferris v. Kelco Disposal*, 109 S. Ct. 2909, 2912 (1989)), and the due process provision of the Fourteenth Amendment (*Bertero v. National General Corp.*, 13 Cal. 3d 43, 66, fn. 13 (1974); *Zhadan v. Downtown L.A.*

Constitutional attacks on the punitive damage scheme in California have been rejected by the California Supreme Court and Court of Appeal. *Bertero v. National General Corp.*, 13 Cal. 3d 43, 66, fn. 13 (1974); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-502 (1976).

For these reasons, remand of the case for reconsideration in light of *Haslip* is not appropriate.

III. CONCLUSION.

In this case, the jury instruction informed the jury, among other things, that its assessment of punitive damages should be based upon the goals of punishment and deterrence in terms which, for all intents and purposes, were identical to those approved in *Haslip*. The amount of the award was less than the 4 to 1 ratio approved in *Haslip*. Post-trial review under the California procedure is in the trial judge's "independent judgment", a stricter standard than approved in *Haslip*. This case is distinguishable from *Haslip* only in its more stringent safeguards for assessment of punitive damages.

Motors, 66 Cal. App. 3d 481, 501-502 (1976); but see *Pacific Mut. Life Ins. Co. v. Haslip* (Ala. 1989) 553 So. 2d 537, 543, Cert. granted April 2, 1990, 1990 U.S.L.W. 15078, No. 89-1279).

The petition should be denied at once.

Respectfully submitted,

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